

sculptural works. As described below, PBS' direct case consists of the submission of voluntary agreements negotiated with organizations representing composers, music publishers and visual artists (these agreements comprise Public Broadcasting Exhibits ("PB Exhs.") 3-12, filed concurrently herewith), proposals with respect to the appropriate rates to be paid pursuant to Sections 304.4 (performing rights), 304.7 (recording rights) and 304.8 (visual rights) of the relevant CRT Regulations, and the basis and support for the recommendations put forward by PBS in that regard.

I.

Music Phase of Proceeding

A. Performing Rights Royalties

2. The American Society of Composers, Authors and Publishers ("ASCAP") is a music performing rights organization that licenses public performing rights to the copyrighted musical compositions of its more than 50,000 members. These members include composers, lyric writers, and music publishers. PBS and National Public Radio ("NPR") (collectively, "Public Broadcasting") have reached agreement with ASCAP with respect to royalty payments to be paid to ASCAP by Public Broadcasting for the years 1993-1997. A copy of this Agreement, dated October 19, 1992, is PB Exh.

3. This Agreement calls for equal, flat annual payments to be made by Public Broadcasting in each year of the five-year 1993-1997 license term. In comparison to the fees called for under the prior 1988-1992 license agreement between ASCAP and Public Broadcasting (see 1987 PBS-NPR Exhibit J; 1987 Tr. 16, 28), the agreed-upon amounts for this new voluntary license agreement reflect, in total, a fifteen percent increase in the fees payable to ASCAP over the term of the license.

3. Broadcast Music, Inc. ("BMI") is a music performing rights organization that licenses public performing rights to the copyrighted musical works of its approximately 150,000 writer and publisher affiliates. Public Broadcasting has reached agreement with BMI with respect to the compulsory royalty payments to be paid to BMI by Public Broadcasting for the years 1993-1997. A copy of this Agreement, dated October 14, 1992, is PB Exh. 4. Although, pursuant to a separate letter agreement, the parties have agreed to keep confidential the specific rates and terms of payment for the new BMI license, the fee arrangements agreed upon with BMI for the 1993-1997 period are consistent -- both in structure (i.e., equal, flat annual payments) and in the level of fee increase from the prior, 1988-1992

voluntary license agreement -- with the new license terms agreed upon with ASCAP.

4. SESAC also licenses music performing rights on behalf of its members. On November 24, 1987, Public Broadcasting entered into an agreement with SESAC for the period 1988-1992, which called for equal, flat annual payments to SESAC. The parties agreed to keep the specific sums paid to SESAC confidential, and to incorporate said payment terms in a confidential side-agreement. Pursuant to the provisions of Paragraph 2(b) of the main agreement, the parties have extended the terms contained in both the license agreement and side-agreement through December 31, 1997, and Public Broadcasting will continue to pay at the same flat annual rate throughout the next license term. A copy of the SESAC-Public Broadcasting license agreement is PB Exh. 5.

5. Inasmuch as, per ¶¶ 2-4 above, voluntary license agreements have been negotiated with ASCAP, BMI and SESAC (the three known performing rights licensing organizations), the only issue remaining for the CRT with respect to PBS' compulsory license to perform musical works is the appropriate adjustment to the royalty rates now reflected in Section 304.4 of the CRT Regulations. These rates are applicable to copyright owners of musical works who are not

affiliated with ASCAP, BMI or SESAC and whose works appear in PBS or PBS-station programming.¹ PBS' proposal with respect to the amendment of Section 304.4 for the upcoming five-year period is quite straightforward: we propose that the CRT increase the rates applicable to unaffiliated copyright owners whose musical works are performed in PBS or PBS-station programming in a manner consistent with the voluntary license agreements negotiated by Public Broadcasting with respect to music performing rights for the 1993-1997 period.

6. Specifically, PBS proposes, with respect to each type of use delineated in Section 304.4: (i) that the rates be increased by fifteen percent over the 1988-1992 rates and set at an equal amount for each year of the 1993-1997 term; and (ii) that this be accomplished by averaging the rates in effect for each year of the 1988-1992 period, multiplying that average or "blended" rate by 115 percent, and applying that new fifteen-percent higher rate in each year of the upcoming license term. The rates resulting from this

1. Section 304.4 also sets forth separate rates for performances of copyrighted music in NPR or NPR-station programming. While Public Broadcasting presents a single, unified position herein with respect to the method for adjusting fees contained in Section 304.4 and the proper level of such fees, the specific rates proposed for NPR and NPR-station performances of works of unaffiliated copyright owners are described in the accompanying affidavit of NPR's general counsel, Theodore A. Miles.

methodology are reflected in PB Exh. 1, titled "Proposed Amendments to CRT Regulations Part 304, Sections 1-13," at § 304.4.² PBS believes the adjustment proposed herein for the rates contained in Section 304.4 to be fair and reasonable for the following reasons:

(a) The proposed rates effectively mirror the rate increases negotiated at arms' length with the two major performing rights organizations, ASCAP and BMI. Similarly, providing for equivalent, flat annual rates over the course of the 1993-1997 license term is consistent with all of the voluntary performing rights license agreements reached by Public Broadcasting. The proposed schedule thus represents a rate schedule and structure that representatives of both copyright owners and public broadcasting entities have found to be fair and adequate compensation to copyright owners. Such marketplace rates are by definition an excellent measure of the value of copyrighted music.

(b) Moreover, as the CRT's prior rulings have emphasized, the use of negotiated rates as a benchmark in the establishment of compulsory license fees is favored by the statute. Section 118(b)(3) expressly provides that the Tribunal "may consider the rates for comparable

2. PB Exh. 2 reflects Public Broadcasting's proposed CRT Regulations, Part 304, Sections 1-13, as amended.

circumstances under voluntary license agreements." Indeed, in 1978, the Tribunal cited that provision in finding that the rate schedules negotiated in a voluntary agreement provided "useful guidance to the CRT" in adopting rate schedules for unaffiliated copyright owners. 43 Fed. Reg. 25068, 25069 (June 8, 1978). The Tribunal similarly has been guided by the terms of voluntary agreements in both the 1982 and 1987 rate adjustment proceedings.

B. Recording Rights Royalties

7. The Harry Fox Agency, Inc. ("HFA") represents a significant percentage of music publishers with respect to the exploitation of synchronization and recording rights in musical compositions. It is the largest such entity in the music recording rights field. Since 1978, and for each succeeding five-year license term (1983-1987 and 1988-1992), Public Broadcasting negotiated voluntary agreements with HFA covering public television and radio programming. These agreements, inter alia, incorporated rate schedules to be applied, on a per use basis, to musical works that HFA had the right to license and which were contained in PBS-distributed programming. Public Broadcasting is pleased to report that it has again reached agreement with HFA on a license covering public television for per use license rates

how much is this?

applicable to PBS-distributed programming during the period 1993-1997.³ A copy of this agreement is PB Exh. 6.

8. The 1993-1997 HFA voluntary license agreement calls for a fifteen percent rate increase compared to the rates contained in the prior license agreement. The increase was computed, consistent with Public Broadcasting's proposal for "unaffiliated" performing rights rates under Section 304.4 (discussed in § 6 above), by averaging the annual rates applicable in each year of the prior 1988-1992 agreement, multiplying that amount by 115 percent, and then applying that new fifteen-percent higher rate throughout the five year license starting on January 1, 1993. The rates from the prior HFA Agreement (submitted herewith as PB Exh. 7) accordingly have been modified as follows:

Uses	1988	1989	1990	1991	1992	Total	(A) Avg. (Total÷5)	New Rate (A) x 1.1
Feature	90.00	90.00	95.00	95.00	100.00	470.00	94.00	\$108.10
Concert	26.75	26.75	28.25	28.75	29.75	139.75	27.95	\$ 32.15
Background	45.00	45.00	47.50	47.50	50.00	235.00	47.00	\$ 54.05
Theme								
Sgl/1st	45.00	45.00	47.50	47.50	50.00	235.00	47.00	\$ 54.05
Other	18.25	18.25	19.25	19.25	20.25	95.25	19.05	\$ 21.91
Bar.								

3. The same agreement covers National Public Radio programming. The terms of the HFA agreement applicable to public radio are described in the accompanying affidavit of Mr. Miles.

9. Thus, in line with all the voluntary performing rights license agreements (and Public Broadcasting's proposal for "unaffiliated" performing rights rates), the license negotiated with HFA calls for flat annual rates to be applied consistently throughout the term of the agreement.

10. In addition to the new agreement with HFA, several other voluntary agreements concerning synchronization and recording rights negotiated by PBS in the 1987-1989 period have, by their terms, been extended to cover the period January 1, 1993 through December 31, 1997. These agreements between PBS and, respectively, the American Mechanical Rights Agency, Inc. ("AMRA"), Copyright Management, Inc. ("CMI") and Bug Music are PB Exhs. 8-10.

11. For unaffiliated copyright owners of recording rights in musical compositions, PBS proposes that the CRT set rates which correspond to the rates contained in the voluntary license agreement negotiated with HFA. This is in conformity with prior CRT practice.⁴

4. See 43 Fed. Reg. at 25069 (June 8, 1978); 47 Fed. Reg. 57923 (Dec. 29, 1982) (adopting, without discussion, the rate increases proposed by PBS and NPR based upon the voluntary agreement reached with HFA); 52 Fed. Reg. at 44612 (Nov. 20, 1987) (finding proposed rates based on HFA voluntary agreement reasonable for purposes of Section 304.7).

12. Specifically, PBS proposes that, as in the past, the rates provided in Section 304.7 of the CRT Regulations for PBS-distributed programming and for non PBS-distributed programming in the aggregate equal the rates provided in the HFA agreement for each specified use category -- feature, concert feature, theme and background.

13. The voluntary license agreement with HFA provides that all of the rights, licenses and uses for television are compensated by the calculation of royalties based upon a per-composition rate schedule for recording musical compositions in PBS-distributed programs. There is no separate rate for local, regional or other programs not distributed nationally by PBS. This is consistent with prior HFA-PBS-NPR agreements. See, e.g., HFA-PBS-NPR Agreement dated September 18, 1987 (PB Exh. 7). In recognition of this fact, the CRT, in the 1987 rate adjustment proceeding, set PBS-distributed and local station rates for recording rights that equaled, in the aggregate, the single negotiated HFA rate for each type of use. 52 Fed. Reg. 49010, 49013 (Dec. 29, 1987). The CRT should again adopt that methodology for purposes of determining rates for unaffiliated copyright owners under Section 304.7. If the CRT simply follows the methodology laid out in ¶ 8 above with respect to each of the rate schedules for television (PBS-distributed and non PBS-distributed)

contained in Section 304.7, (i.e., increasing the average of the five prior annual rates by fifteen percent), the rates, in the aggregate, will conform to the rates reflected in the HFA agreement. This will ensure fair and reasonable royalty payments to both unaffiliated copyright owners and those who receive remuneration pursuant to the terms of the HFA agreement.

II.

Visual Works Phase of Proceeding

14. While PBS has endeavored, since the enactment of Section 118, to negotiate voluntary license agreements with various associations of visual artists, these efforts have been hampered by the fact that -- unlike music rights societies which have the power to bind their members, collect royalty payments on their behalf and provide related warranties and indemnities to the licensee -- most associations in the visual arts field do not have the same power to bind their members. They thus cannot provide PBS with the rights it requires under its voluntary agreements. Indeed, in its 1978 decision, the CRT acknowledged the "fragmented nature" of the visual arts field. 43 Fed. Reg. at 25070.

15. The visual artists organizations with whom PBS has negotiated in the past would not dispute these

representations. Mr. Tad Crawford, who represents the Coalition of Visual Artists ("COVA") and the American Society of Magazine Photographers ("ASMP"), has indicated in the course of the last several rate adjustment proceedings that -- notwithstanding PBS' desire to participate in voluntary license agreements -- COVA and ASMP do not have the authority to bind their members to the terms of such an agreement. See 1987 Crawford Statement; 1987 Tr. 60-61; 1982 Tr. 316.

16. In 1987, however, for the first time in the history of these proceedings, a voluntary license agreement in the visual arts field, containing agreed-upon per-work rates for the licensed works, was successfully negotiated between PBS and the Artists Rights Society, Inc. ("ARS"). That Agreement (1987 PBS Exh. 3) was dated September 18, 1987. ARS represents primarily French artists. 1987 Tr. 60. It has the power to bind its members, receive royalty payments on their behalf and provide related warranties and indemnities. It has on the order of 5,000 members. 1987 PBS Exh. 3, Schedule A. The size of this representation in relation to the total visual arts industry is not known. 1987 Tr. 60.

17. Pursuant to the provisions of paragraph 2(b) of the 1987 PBS-ARS agreement, the terms of that agreement have

been extended through December 31, 1997. The Agreement has been refiled herein and comprises PB Exh. 11.

18. Subsequent to conclusion of the 1987 public broadcasting rate adjustment proceedings and negotiation of the agreement with ARS, PBS entered into a second voluntary license agreement in the visual arts field. This agreement, dated February 21, 1989, was with the Visual Artists and Galleries Association, Inc. ("VAGA"). Pursuant to that agreement, PBS obtained the right to use copyrighted pictorial, graphic and sculptural works of over 200 artists, as well as the works of foreign artists belonging to various European copyright societies represented by VAGA. The per-work rates for the years 1989-1992 payable by PBS pursuant to that agreement mirror the per-work rates contained in the PBS-ARS agreement for such years.

19. Pursuant to the provisions of paragraph 2(b) of the 1989 PBS-VAGA agreement, the terms of that agreement have been extended through December 31, 1997. The Agreement has been refiled herein and comprises PB Exh. 12.

20. PBS proposes that the CRT set per-work rates (under Section 304.8) for the use of published pictorial, graphic and sculptural works for those artists not affiliated with either ARS or VAGA that will replicate the fees ARS and VAGA artists will receive during the 1993-1997 license term under the aforementioned agreements. The rates

for this period comprise a continuation of the 1992 rates, as set forth on Schedule B in both the ARS and VAGA agreements (PB Exhs. 11 and 12), respectively. PBS' proposal for the "unaffiliated" per-work rates under Section 304.8 -- which corresponds to the rates contained in the ARS and VAGA agreements -- is set forth in PB Exhs. 1 and 2, at Section 304.8.

21. The rates set forth under the voluntary license agreements with ARS and VAGA surely provide the appropriate benchmark for the setting of fair and reasonable rates for the use of published pictorial, graphic and sculptural works under Section 304.8. Were the CRT to provide, under Section 304.8, for higher rates for unaffiliated artists than those which are to be paid pursuant to arms' length voluntary agreements, it would: (i) subvert the Tribunal's policy of encouraging voluntary agreements; (ii) discourage future negotiation of voluntary agreements; and (iii) place a significant strain on the relationship between PBS and the two organizations with whom it has negotiated license agreements, with potentially adverse consequences for future cooperative efforts between these parties. PBS' proposal for rates under Section 304.8 therefore should be adopted.

Summary

22. PBS requests that the CRT adopt the royalty rates proposed by PBS for music performing rights (Section 304.4),

music recording rights (Section 304.7) and the use of published visual works (Section 304.8). The voluntary agreements upon which all of these proposals are premised render the rates suggested herein fair and reasonable; they comprise as good a proxy as can be found for the value of the copyrighted elements at issue in this proceeding.


Paula A. Jameson

Sworn to before me this
day of October, 1992


Notary Public

My Commission Expires
10/31/95.

April 18, 1996

MEMORANDUM

To: Marilyn J. Kretsinger
William Roberts
Tanya Sandros

From: Bob Cassler

Subject: PBS and the Unaffiliated Copyright Owners

In an earlier conversation, I asked Paula Jameson to identify specifically which rule sections she was most concerned about in next year's public broadcasting rate adjustment.

She has replied that her concerns are with \$253.4 (performing rights of musical works by unaffiliated composers), \$253.7 (recording rights for unaffiliated music publishers), and \$253.8 (display rights for unaffiliated visual artists).

She has faxed me PBS' pleading in the 1992 rate adjustment proceeding at the CRT. The pleading is intended to make the following points:

(a) Although there is no way PBS could negotiate with unaffiliate composers, the 15% increase for payments to unaffiliate composers was based on agreements PBS reached with the performing rights societies. See paragraph (a) on page 6.

(b) Although there is no way PBS could negotiate with unaffiliated music publishers, the 15% increase for payments to unaffiliated music publishers was based on the agreement PBS reached with the Harry Fox Agency. See paragraph 11 on page 9.

(c) Although there is no way PBS could negotiate with unaffiliated visual artists, the rates for unaffiliated visual artists replicate the fees negotiated with the Visual Artists and Galleries Association and the Artists Rights Society. See paragraph 20 on page 13.

Please read the attached faxed pleading, and let's meet after I return from vacation to discuss whether PBS could use §251.63(b) to have the Librarian adopt PBS-proposed rates in 1997, if they are reached the same way they were reached in 1992.

ATTACHED NOTES

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